Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

JEROME KAHN HOROWITZ,

Petitioner,

vs.

STATE BAR OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR A WRIT OF CERTIORARI

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June 6, 1994

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QUESTION PRESENTED

When the state seeks to disbar or suspend an attorney's law license pursuant to a rule requiring disbarment or suspension upon conviction of certain crimes involving "moral turpitude," does the due process clause guarantee the attorney the right to a full and fair opportunity to present evidence that his conduct did not involve moral turpitude?

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No. _____

In The

Supreme Court of the United States

October Term, 1993

JEROME KAHN HOROWITZ,

Petitioner,

vs.

STATE BAR OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR A WRIT OF CERTIORARI

Jerome Kahn Horowitz respectfully petitions for a Writ of Certiorari to review the judgment of The Supreme Court of Texas in this case.

OPINIONS BELOW

The judgment of the Board of Disciplinary Appeals is unreported (App., *infra*. 2a). The Supreme Court of Texas affirmed the judgment of the Board of Disciplinary Appeals (App., *infra*. 1a) and denied Petitioner's Motion for Rehearing without opinion (App., *infra*. 8a).

JURISDICTION

The Supreme Court of Texas affirmed the judgment of the Board of Disciplinary Appeals on January 12, 1994, and then denied Petitioner's Motion for Rehearing on March 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

U.S. CONST., AMEND. XIV, §1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rules of Procedure for Compulsory Discipline Matters Before the Board of Disciplinary Appeals

I. Initiation of Proceeding:

Pursuant to Texas Rule of Disciplinary Procedure 8.03, the State Bar of Texas shall file a petition with the Board of Disciplinary Appeals and serve the Respondent Attorney in accordance with the Texas Rules of Civil Procedure, and such notice shall include the date and place of hearing which shall not be fewer than 20 days from the service of petition. Within twenty (20) days of

service of the petition, the Respondent shall file an answer setting forth:

(a) Any factual dispute as to whether the Respondent is the same person as the party adjudicated guilty or who received probation with or without an adjudication of guilt;

(b) any factual dispute as to the validity of the conviction;

(c) any legal argument that the offense for which the Respondent has been convicted is not an Intentional Crime as defined in Texas Rules of Disciplinary Procedure 1.06(O).

II. Hearing:

The hearing shall be limited to the introduction of evidence contesting the issue of identity or challenging the validity of the conviction. Legal argument shall be limited to whether the offense for which the Respondent has been convicted is an Intentional Crime as defined in Texas Rules of Disciplinary Procedure 1.06(O).

STATEMENT

Petitioner was convicted of the crime of sexual assault in a Texas state court. The State Bar of Texas, which governs the conduct of attorneys licensed to practice law in Texas, commenced a "compulsory" discipline proceeding against Petitioner based upon the conviction. The Board of Disciplinary Appeals entered a judgment

suspending Petitioner from the practice of law for ten years. The Supreme Court of Texas affirmed the judgment of the Board of Disciplinary Appeals and denied Petitioner's Motion for Rehearing.

A. Attorney Disciplinary Proceedings in Texas

The Supreme Court of Texas has delegated the responsibility for disciplining lawyers to the Board of Directors of the State Bar of Texas. Attorney disciplinary cases are governed by the Texas Rules of Disciplinary Procedure ("Disciplinary Rules"). Part VII and Part VIII of the Disciplinary Rules (App., *infra.* 9a) mandate the compulsory disbarment or suspension of an attorney's law license by the Board of Disciplinary Appeals ("BODA") when an attorney has been convicted of an Intentional Crime as defined by Rule 1.06(O), Tex.R.Disc.P. (App., *infra.* 13a). BODA has promulgated the Rules of Procedure for Compulsory Discipline Matters Before the Board of Disciplinary Appeals ("Compulsory Discipline Rules"), *supra,* which govern compulsory discipline proceedings under Part VIII of the Disciplinary Rules. The Compulsory Discipline Rules limit the matters which an attorney may plead in his defense; limit the introduction of evidence to matters contesting the issue of identity or challenging the validity of the conviction; and limit legal argument to whether the *offense* for which the attorney has been convicted is an Intentional Crime. The Compulsory Discipline Rules prohibit the attorney from presenting evidence regarding whether his *conduct* (as opposed to the crime) involved moral turpitude.

B. Proceedings Below

Petitioner was convicted of the offense of sexual assault by judgment dated August 5, 1993 (App., *infra.* 14a) and was sentenced to ten years probation. The elements of this offense are set out in §22.011, V.T.C.A., Penal Code (App., *infra.* 21a). The Charge of the trial court included §§22.011(b)(3) and (5) in the definition of "consent."

At the compulsory discipline proceeding before BODA, Petitioner argued that although a conviction for sexual assault may be an Intentional Crime because it involves moral turpitude, there are occasions in which a citizen can be convicted of sexual assault without being guilty of moral turpitude (App., *infra.* 24a); therefore, BODA must consider the conduct, knowledge and intent of the attorney to determine if he has been convicted of a felony involving moral turpitude. Petitioner argued that BODA's procedural rules prevented him from offering evidence regarding whether his conduct, knowledge and intent involved moral turpitude and thus violated his due process rights under the 14th Amendment (App., *infra.* 24a) . During the proceeding, Petitioner made a bill of exceptions outside the presence of BODA in which Petitioner offered testimony regarding the facts underlying the conviction (App., *infra.* 38a). Petitioner alleged in his response in the compulsory discipline proceeding that the Compulsory Discipline Rules were unconstitutional

because they so severely limited the factual and legal issues to be considered (App., *infra*. 44a). BODA concluded that Petitioner had been convicted of an Intentional Crime and suspended Petitioner from the practice of law for ten years, the period of his criminal probation. It is unclear whether BODA considered Petitioner's constitutional arguments.

Petitioner timely appealed BODA's judgment directly to the Supreme Court of Texas pursuant to Rule 7.11, Tex. R. Disc. P. (App., *infra*. 9a), and requested oral argument. Petitioner raised the federal question sought to be reviewed in Point of Error Three of his brief to the Supreme Court of Texas (App., *infra*. 50a). The Supreme Court of Texas affirmed the judgment of BODA without granting oral argument and without issuing an opinion. Petitioner again raised the federal question sought to be reviewed in paragraphs 2 and 5-12 of his Motion for Rehearing (App., *infra*. 56a). The Supreme Court of Texas denied the Motion for Rehearing.

C. Independent and Adequate State Grounds

When BODA entered its judgment, it either did not consider Petitioner's federal constitutional argument or it determined that Petitioner's due process rights under the 14th Amendment were not violated. When the Supreme Court of Texas affirmed the judgment of BODA, it either did not consider Petitioner's federal constitutional argument or it determined that Petitioner's due process rights under the 14th Amendment were not violated. In either case, there was no independent and adequate state

ground to support BODA's judgment or the affirmance by the Supreme Court of Texas.

REASONS FOR GRANTING THE PETITION

This case is an opportunity for the Court to provide much needed guidance to the multiplying federal and state agencies which are called upon to regulate individuals who are licensed to practice their occupations, particularly those agencies which determine whether certain conduct or crimes involve moral turpitude. In an effort to save time, money and expense, many of these agencies have instituted summary proceedings which prohibit the citizen from presenting evidence. In addition, the decision below is erroneous and the issue that it addresses is important.

I. The procedural due process requirements applicable to disciplinary actions by agencies are of nationwide significance.

In an apparent effort to streamline proceedings and conserve scarce time and resources, an increasing number of federal and state agencies are instituting summary proceedings which eliminate the traditional federal notions of procedural due process. Many of these agencies have been delegated the task of determining whether certain crimes involve moral turpitude; the consequences of this determination include deportation[1]; forfeiture of

[1] 8 U.S.C. §1251(a)(2)(A)(i) (West Supp. 1994)

Veterans Administration Benefits[2]; loss of a petroleum marketing license[3]; loss of a pharmaceutical license[4]; loss of the right to practice law in the Securities and Exchange Commission[5]; the Tax Court[6]; the Patent Office[7]; and the loss of the right to practice a licensed occupation.

The list of occupations for which a license is required is expanding greatly in many states. It is not only doctors, lawyers and accountants who must be licensed by the state; today athletic agents[8], barbers[9], auctioneers[10], boxing and wrestling promoters[11], cosmetologists[12], occupational therapists[13], hearing aid dispensers[14], as well as others, must be licensed in Texas. Many state and federal agencies institute automatic disciplinary proceedings upon conviction of certain crimes, particularly crimes which involve moral turpitude. Too often, the proceedings used by these agencies prohibit the individual from presenting evidence regarding his conduct, knowledge or intent. When it is clear that the elements of an offense

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[2] 38 U.S.C. App. §3.12(d)(3) (West 1991).

[3] 15 U.S.C. §2802 (West 1982)

[4] 21 U.S.C. §206 (West 1972)

[5] 15 U.S.C. foll. §78U rule 2(e) (West 1981)

[6] 26 U.S.C. foll. §7453 rule 202(a) (West 1989)

[7] 35 U.S.C. App. §10.23(6)(3) (West Supp. 1994.)

[8] Tex.Rev.Civ.Stat.Ann. art. 8871 (Vernon Supp. 1994)

[9] Tex.Rev.Civ.Stat.Ann. art. 8407(a) (Vernon Supp. 1994)

[10] Tex.Rev.Civ.Stat.Ann. art. 8700 (Vernon Supp. 1994)

[11] Tex.Rev.Civ.Stat.Ann. art. 8501-1 (Vernon Supp. 1994)

[12] Tex.Rev.Civ.Stat.Ann. art 8451a (Vernon Supp. 1994)

[13] Tex.Rev.Civ. Stat.Ann. art 8851 (Vernon Supp. 1994)

[14] Tex.Rev.Civ.Stat.Ann. art. 4566-1.04 (Vernon Supp. 1994)

involve moral turpitude *as a matter of law*, such as a crime involving fraud, a summary proceeding in which the individual has no right to present evidence or cross-examine witnesses may suffice. However, when the elements of a crime allow for conviction based upon conduct which may not involve moral turpitude, such as the definition of sexual assault under §22.011, V.T.C.A., Penal Code, the denial of the opportunity to be heard violates the individual's right to procedural due process under the 14th Amendment.

This Court has determined that a standard involving "moral turpitude" in a deportation proceeding is not void for vagueness with respect to crimes in which fraud is an ingredient. *Jordan v. DeGeorge*, 341 U.S. 223 (1951). The increasing application of the moral turpitude standard affects the rights of individuals nationwide. Since it appears that the determination of which substantive crimes involve moral turpitude *as a matter of law* will develop slowly through case law, the Court should take this opportunity to instruct these agencies on the procedures they must follow when determining whether an individual is guilty of a crime or conduct involving moral turpitude.

II. The decision of the Supreme Court of Texas is erroneous

The right or privilege to engage in a profession or occupation, once it is lawfully acquired, is a right or privilege protected by the due process clauses of the United States Constitution. *Francisco v. Board of Dental Examiners*, 149 S.W.2d 619 (Tex.Civ.App. – Austin 1941,

writ ref'd). *Industrial Accident Board v. O'Dowd*, 303 S.W.2d 763 (Tex. 1957). A citizen's due process rights apply whether the tribunal exercising jurisdiction over his rights or privileges is a judicial, legislative, executive or administrative one.

> The provisions of the Fourteenth Amendment apply to the exercise of state power through an administrative tribunal having jurisdiction over the rights or privileges of a licensed occupation.

Madden v. Texas Board of Chiropractic Examiners, 663 S.W.2d 622, 625 (Tex.App. – Austin 1983, writ ref'd n.r.e.).

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard. . . . " It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."

Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994 (1972) (*ex parte* seizure of property); *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965).

The purpose of due process is to minimize substantively unfair or mistaken deprivations of property, rights or privileges. *Fuentes*, at U.S. 81. The right to a hearing includes the right to present evidence. *Gonzales v. United States*, 348 U.S. 407 (1955); *Morgan v. United States*, 304 U.S. 1 (1938). An individual should be allowed the right to present evidence, the right to be heard in person, the right to present and cross-examine witnesses, a neutral and detached decision-maker, and a written statement of the evidence relied upon. *Jessen v. Village of Lyndon Station*, 519 F.Supp. 1183 (1981) and cases cited therein.

> . . . due process requires that one charged with contempt be accorded the opportunity not only to establish a complete defense, but to offer evidence and argument in extenuation of his offense and in mitigation of the penalty.
>
> A prior hearing always imposes some costs in time, effort and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. . . . Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.
>
> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praise-worthy government officials no less, and perhaps more, than mediocre ones. *Stanley v. Illinois*, 405 U.S. 645, 656, 92 S.Ct. 1208, 1215, 31 L.Ed.2d 551.

Fuentes, at U.S. 90, n. 22.

The offense of sexual assault is not *per se* an intentional crime as defined by Rule 1.06(O) Tex.R.Disc.P. Petitioner's argument focuses on the *mens rea* applicable to each element of the offense. The Texas legislature has defined the offense of sexual assault to include conduct

whereby a man or woman can be convicted of the offense even if he or she has an honest belief that consent is present. The legislature has decided that the harm done by a man or woman engaging in sexual conduct with another under a mistaken but honest belief that he or she has consent is sufficient to merit a criminal conviction.

Most adults engage in the conduct which constitutes the offense of sexual assault; this conduct is not morally wrong. The element of the offense which makes the conduct a crime is the element of "consent." It is clear that under subsections 22.011(b)(3) and (5), a citizen can be found guilty of sexual assault even if he or she honestly believes there was consent. The elements of the offense do not require that the fact finder determine that the citizen knew he or she did not have consent. If an attorney honestly believes he or she has the consent of the other person to engage in sexual conduct, there is no "moral turpitude" on the part of the attorney.

If two attorneys voluntarily consume nearly a bottle of tequila at a Christmas party and they both become inebriated to the extent described in §22.011(b)(3) and (5), and then the attorneys engage in sexual conduct, they have both committed sexual assault. It is difficult to see how this conduct bears on the attorneys' moral fitness to continue in the practice of law. When BODA determined, for the first time, that a conviction for sexual assault is *per se* an intentional crime, it violated Appellant's due process rights.

> These elements of fundamental fairness were particularly undermined in Madden's case by the essentially subjective and undefined terms

> of the controlling definition ultimately settled upon by the Board in its final order. . . .

Madden, at 627. The determination by BODA that sexual assault is *per se* an intentional crime announced a new rule and has the same effect upon Petitioner as did the Chiropractic Board's determination upon Madden.

The Compulsory Discipline Rules prohibited Appellant from pleading or offering any evidence about the underlying conduct, particularly the "consent" issue. Because the offense of sexual assault is not *always* an intentional crime, the application of the Compulsory Discipline Rules violated Appellant's due process rights under the 14th Amendment of the United States Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KURT M. SAUER
Counsel of Record

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January 12, 1994

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Austin, TX 78711

RE: Case No. D-4477

Style: JEROME KAHN HOROWITZ
v. STATE BAR OF TEXAS

Dear Counsel:

Today, the Supreme Court of Texas affirmed the decision of the Board of Disciplinary Appeals in the above referenced case.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca Morin, Deputy

No. 92377

IN THE MATTER OF	§	BEFORE THE BOARD
JEROME KAHN HOROWITZ	§	OF
	§	DISCIPLINARY APPEALS
STATE BAR CARD NO. 10011690	§	

JUDGMENT

On the 5th day of November, 1993, the above-styled and numbered compulsory disciplinary action was called for hearing before the Board of Disciplinary Appeals. Petitioner appeared by attorney and announced ready. Respondent appeared in person and by his attorney of record. All matters of fact as well as all matters of law were submitted to the Board of Disciplinary Appeals for determination. Having considered the pleadings on file, having received evidence, and having heard the argument of counsel, the Board of Disciplinary Appeals is of the opinion that Petitioner is entitled to entry of the following findings and orders:

Findings of Fact. The Board of Disciplinary Appeals finds that:

(1) Respondent, JEROME KAHN HOROWITZ, is an attorney licensed to practice law in the State of Texas whose State Bar Card No. is 10011690; and

(2) On or about May 19, 1993, Respondent, JEROME KAHN HOROWITZ, was convicted of the offense of sexual assault in Cause No. 92CR0767, styled The State of Texas v. Jerome Kahn Horowitz, 212th Judicial District Court of

Galveston County, Texas. Respondent was sentenced to a term of ten (10) years probation and was ordered to pay a fine in the amount of $6,800.

Conclusions of Law. Based upon the foregoing findings of facts the Board of Disciplinary Appeals makes the following conclusions of law:

(1) This Board has jurisdiction to hear and determine this matter. Rule 9.01, Texas Rules of Disciplinary Procedure;

(2) Respondent, JEROME KAHN HOROWITZ, has been convicted of an intentional crime as defined by Rule 1.06(O), Texas Rules of Disciplinary Procedure; and

(3) Respondent, JEROME KAHN HOROWITZ, should be actively suspended for the period of his criminal probation. Rule 8.06, Texas Rules of Disciplinary Procedure.

It is, accordingly, ORDERED, ADJUDGED, AND DECREED that Respondent, JEROME KAHN HOROWITZ, State Bar Card No. 10011690, be and he is hereby actively suspended from the practice of law in the State of Texas effective the date of entry of this judgment and ending August 4, 2003. It is further ORDERED, ADJUDGED and DECREED that Respondent, JEROME KAHN HOROWITZ, is hereafter prohibited during the period of active suspension ordered herein from practicing law in Texas, holding himself out as an attorney at law, performing any legal service for others, accepting any fee directly or indirectly for legal services, appearing as counsel or in any representative capacity in any proceeding in any court in any Texas court or before any

Texas administrative body, or holding himself out to others or using his name, in any manner, in conjunction with the words "attorney," "counselor," or "lawyer."

It is further ORDERED that Respondent, JEROME KAHN HOROWITZ, not later than December 9, 1993, shall notify in writing each and every justice of the peace, judge, magistrate, and chief justice of each and every Texas court, if any, in which Respondent, JEROME KAHN HOROWITZ, has any legal matter pending, if any, of his suspension, of the style and cause number of the pending matter(s), and of the name, address, and telephone number of the client(s) Respondent is representing in that court. Respondent is also ORDERED to mail copies of all such notifications to the Office of the General Counsel, State Bar of Texas, P.O. Box 12487, Capitol Station, Austin, Texas 78711.

It is further ORDERED that Respondent, JEROME KAHN HOROWITZ, shall notify each of his current Texas clients, if any, in writing, of his suspension no later than December 9, 1993. In addition to such notification, Respondent is ORDERED to return all files, papers, unearned fees paid in advance, and all other monies and properties which are in his possession but which belong to current or former Texas clients, if any, to those respective Texas clients or former Texas clients by December 9, 1993. Respondent is further ORDERED to file with the Office of the General Counsel, State Bar of Texas, P.O. Box 12487, Capitol Station, Austin, Texas 78711, within the same thirty (30) days, an affidavit stating that all current Texas clients, if any, have been notified of his suspension and that all files, papers, unearned fees paid in advance, and all other monies and properties belonging to clients

and former clients have been returned as ordered herein. If Respondent should be unable to return any file, papers, money or other property to any client or former client, Respondent's affidavit shall state with particularity the efforts made by Respondent with respect to each particular client and the cause of his inability to return to said client any file, paper, money or other property. Respondent is also ORDERED to mail a copy of said affidavit to the Board of Disciplinary Appeals.

It is further ORDERED that Respondent, JEROME KAHN HOROWITZ, immediately surrender his Texas law license and permanent State Bar Card to the Office of the General Counsel, State Bar of Texas, for transmittal to the Clerk of the Supreme Court of Texas.

It is further ORDERED that, in the event that Respondent's above-described criminal probation is revoked, then Respondent, JEROME KAHN HOROWITZ, shall be disbarred upon the filing by the Chief Disciplinary Counsel of certified copies of court documents evidencing said revocation.

It is further ORDERED that a certified copy of the Petition for Compulsory Disciplinary Action on file herein, along with a copy of this Judgment, be sent to the General Counsel of the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

Signed this 9th day of November, 1993.

/s/ Thomas H. Watkins
THOMAS H. WATKINS,
CHAIRMAN
BOARD OF DISCIPLINARY
APPEALS

IN THE SUPREME COURT OF TEXAS

NO. D-3811

STATE BAR OF TEXAS, PETITIONER

v.

LLOYD E. HUMPHREYS, RESPONDENT

ON APPEAL FROM THE BOARD OF DISCIPLINARY APPEALS

PER CURIAM ORDER

The Texas Rules of Disciplinary Procedure, which became effective on May 1, 1992, provide for an appeal from a determination of the Board of Disciplinary Appeals directly to this court. We consider the appropriate procedure for such appeals.

Rule 7.11 of the Texas Rules of Disciplinary Procedure provides:

> An appeal from a determination of the Board of Disciplinary Appeals . . . must be filed with the Clerk of the Supreme Court within fourteen days after the receipt by the appealing party of the determination of the Board of Disciplinary Appeals from which the appeal is taken. Except as expressly herein provided, the appeal must be made pursuant to the then applicable Texas Rules of Appellate Procedure.

It is unclear from this rule, however, whether the entire appeal or merely a notice of appeal must be filed within the fourteen-day period or whether the timetable for

briefs is governed by that applicable to the courts of appeals or the supreme court.

Because an appeal from the Board of Disciplinary Appeals resembles that taken from a trial court to the court of appeals, similar procedures should apply. Within fourteen days after receipt of notice of a final determination by the Board of Disciplinary Appeals, a notice of appeal must be filed directly with this court. The record must be filed within sixty days after the Board's determination. The appealing party's brief is due thirty days after the record is filed, and the responding party's brief must be filed within twenty-five days thereafter.

To ensure that all parties are aware of the appropriate procedures, the Board of Disciplinary Appeals is instructed to provide a copy of this order to all parties with any final determination it renders.

Order delivered: June 23, 1993

THE SUPREME COURT OF TEXAS
P. O. Box 12248
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Austin, Texas 78711
John T. Adams, Clerk

9 March, 1994

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Austin, TX 78711

RE: Case No. D-4477

Style: JEROME KAHN HOROWITZ v. STATE BAR OF TEXAS

Dear Counsel:

Motion for rehearing of appeal of the decision of the Board of Disciplinary Appeals in the above referenced case was this day overruled. The motion to stay is overruled.

Sincerely,

John T. Adams, Clerk

by /s/ Courtland Crocker
Courtland Crocker
Deputy

RULE 7.08 POWERS AND DUTIES

The Board of Disciplinary Appeals shall exercise the following powers and duties:

G. Hear and determine actions for compulsory discipline under Part VIII.

RULE 7.11 JUDICIAL REVIEW

An appeal from a determination of the Board of Disciplinary Appeals shall be to the Supreme Court. If such an appeal is to be taken, it must be filed with the Clerk of the Supreme Court within fourteen days after the receipt by the appealing party of the determination of the Board of Disciplinary Appeals from which the appeal is taken. Except as herein expressly provided, the appeal must be made pursuant to the then applicable Texas Rules of Appellate Procedure. Oral argument may be granted on motion. The case shall be reviewed under the substantial evidence rule. The Court may affirm a decision of the Board of Disciplinary Appeals by order without written opinion.
(Eff. May 1, 1992.)

PART VIII. COMPULSORY DISCIPLINE

RULE 8.01 GENERALLY

When an attorney licensed to practice law in Texas has been convicted of an Intentional Crime or has been

placed on probation for an Intentional Crime with or without an adjudication of guilt, the Chief Disciplinary Counsel shall initiate a Disciplinary Action seeking compulsory discipline pursuant to this part. Proceedings under this part are not exclusive in that an attorney may be disciplined as a result of the underlying facts as well as being disciplined upon the conviction or probation through deferred adjudication.
(Eff. May 1, 1992.)

RULE 8.02 CONCLUSIVE EVIDENCE

In any Disciplinary Action brought under this part, the record of conviction or order of deferred adjudication is conclusive evidence of the attorney's guilt.
(Eff. May 1, 1992.)

RULE 8.03 COMMENCMENT OF SUIT

A Disciplinary Action under this part must be initiated by the filing of a petition with the Board of Disciplinary Appeals. The petition must allege the adjudication of guilt (or probation without an adjudication of guilt) of an Intentional Crime; allege that the Respondent is the same person as the party adjudicated guilty or who received probation with or without an adjudication of guilt for such Intentional Crime; and seek the appropriate discipline.
(Eff. May 1, 1992.)

RULE 8.04 PROCEDURE

The Board of Disciplinary Appeals shall hear and determine all questions of law and fact. When an attorney

has been convicted of an Intentional Crime or has been placed on probation for an Intentional Crime without an adjudication of guilt, he or she shall be suspended as an attorney licensed to practice law in Texas during the appeal of the conviction or the order of deferred adjudication. Upon introduction into evidence of a certified copy of the judgment of conviction or order of deferred adjudication and a certificate of the Clerk of the Supreme Court that the attorney is licensed to practice law in Texas, the Board of Disciplinary Appeals shall immediately determine whether the attorney has been convicted of an Intentional Crime or granted probation without an adjudication of guilt for an Intentional Crime. Uncontroverted affidavits that the attorney is the same person as the person convicted or granted probation without an adjudication of guilt are competent and sufficient evidence of those facts. Nothing in these rules prohibits proof of the necessary elements in such Disciplinary Action by competent evidence in any other manner permitted by law. The Board of Disciplinary Appeals shall sit, hear, and determine whether the attorney should be disciplined and enter judgment accordingly within forty-five days of the answer day; however, any failure to do so within the time limit will not affect its jurisdiction to act. Any suspension ordered during the appeal of a criminal conviction or probation without an adjudication of guilt is interlocutory and immediately terminates if the conviction or probation is set aside or reversed.

(Eff. May 1, 1992.)

RULE 8.05 DISBARMENT

When an attorney has been convicted of an Intentional Crime, and that conviction has become final, or the attorney has accepted probation with or without an adjudication of guilt for an Intentional Crime, the attorney shall be disbarred unless the Board of Disciplinary Appeals, under Section 8.06, suspends his or her license to practice law. If the attorney's license to practice law has been suspended during the appeal of the criminal conviction, the Chief Disciplinary Counsel shall file a motion for final judgment of disbarment with the Board of Disciplinary Appeals. If the motion is supported by affidavits or certified copies of court documents showing that the conviction has become final, the motion shall be granted without hearing, unless within ten days following the service of the motion pursuant to Rule 21a, Texas Rules of Civil Procedure, upon the attorney so convicted or his or her attorney of record, the attorney so convicted files a verified denial contesting the finality of the judgment, in which event the Board of Disciplinary Appeals will immediately conduct a hearing to determine the issue. If no Disciplinary Action is pending at the time the conviction becomes final, disbarment shall be initiated by filing a Disciplinary Action.
(Eff. May 1, 1992.)

RULE 8.06 SUSPENSION

If an attorney's sentence upon conviction of a Serious Crime is fully probated, or if an attorney receives probation through deferred adjudication in connection with a Serious Crime, the attorney's license to practice law shall

be suspended during the term of probation. If an attorney is suspended during the term of probation, the suspension shall be conditioned upon the attorney's satisfactorily completing the terms of probation. If probation is revoked, the attorney shall be disbarred. An early termination of probation does not result in reinstatement until the entire probationary period, as originally assessed, has expired.
(Eff. May 1, 1992.)

RULE 1.06

* * *

O. "Intentional Crime" means (1) any Serious Crime that requires proof of knowledge or intent as an essential element or (2) any crime involving misapplication of money or other property held as a fiduciary.

* * *

U. "Serious Crime" means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

NO. 92CR0767

THE STATE OF TEXAS IN THE DISTRICT COURT OF
VS. GALVESTON COUNTY, TEXAS
JERRY HOROWITZ 212TH JUDICIAL DISTRICT

JUDGMENT

(Filed Aug. 5, 1993)

On the 5th day of August, 1993, the above numbered and entitled cause was regularly reached and called for trial, when came the State of Texas by her Criminal District Attorney and the Defendant, JERRY HOROWITZ, appeared in person and by his Attorney, Joe Bailey, and both parties announced ready for trial, and the Defendant was duly arraigned in open Court and pleaded not guilty to the charge contained in the indictment; thereupon a jury, to-wit: JAMES SHOTWELL and eleven other [sic], was duly selected, impaneled, and sworn, who having heard the evidence submitted and having been duly charged by the Court, and having heard the arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterwards being brought into open Court by the proper officer, and the Defendant and his counsel being present, and in due form of law returned into open Court the following verdict on the 19th day of May, 1993, which was received by the Court, and is here and now entered upon the minutes of the Court, to-wit:

> "We, the Jury, find the Defendant, JERRY HOROWITZ, guilty of the offense of SEXUAL ASSAULT.
>
> /s/ JAMES SHOTWELL
> Foreman of the Jury"

The Defendant named above not having requested in writing at the time he entered his plea that the jury assess the punishment; the jury was discharged.

On the 30th day of June, 1993, the Defendant appeared in person and with his attorney, Joe Bailey, and the State appeared by her Criminal District Attorney and in accordance with the law the Court heard further evidence on the issue of punishment and after arguments of counsel, assessed punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a period of TEN (10) years (and in addition thereto pay a fine/restitution in the amount of $ 6,800.00).

And it further appearing to the Court that the Defendant, has not previously been convicted of a felony, and that the ends of justice and the best interest of the public as well as the Defendant will be served thereby, the imposition of sentence is suspended, and the said Defendant herein is hereby placed on probation for a period of TEN (10) years, in accordance with the Adult Probation and parole law of the State of Texas, conditioned that during the term of the probation the Defendant shall (all references to G.C.C.S.C.D. means the Galveston County Community Supervision and Corrections Department):

1. Commit no offense against the laws of the State of Texas or of any other State, the United States or any governmental entity;

2. Avoid injurious or vicious habits;

3. Avoid persons or places of disreputable or harmful character; and specifically avoid association with any person previously convicted of a crime, or presence at any location where a criminal act is being committed;

4. Report in person to the Probation Officer, at least once each month as directed by the Probation Officer and obey all rules and regulations of the G.C.C.S.C.D.;

5. Permit the Probation Officer to visit at his home or elsewhere without restriction;

6. If you are currently working, continue to work at such employment as long as possible and if unemployed, serious attempts must be made to find employment and proof of such attempts must be shown to your probation officer at each reporting session;

7. Remain in the following location: Harris County, Texas unless obtaining permission to leave from this court;

8. Support all dependents he may have or acquire during the term of probation;

9. Report within forty-eight hours to the Probation Officer any change of address, employment, or marital status; any arrests and all sources and amounts of income or money received;

10. Abstain from the use or possession of any drugs, except those taken or possessed under doctors orders;

11. Never become intoxicated;

12. Pay to the G.C.C.S.C.D. $ 40.00 per month as a probation fee;

13. Pay to the G.C.C.S.C.D. $ 82.50 in Court Costs. Such costs shall be paid (by Oct. 5, 1993) [Remainder Deleted by Court];

14. [Deleted by Court];

15. (X) Pay to the G.C.C.S.C.D. $ 6,800.00 as restitution to the victim. Such restitution shall be paid [Remainder Deleted by Court] (in installments of $ 160.00 per month paid each month);

16. [Deleted by Court];

16A. (X) Pay to the G.C.C.S.C.D. $ 25.00 as a Crime Stoppers Program payment. Such payment shall be paid (by Oct. 5, 1993) [Remainder Deleted by Court];

16B. [Deleted by Court];

16C. [Deleted by Court];

17. (X) Participate in a drug/alcohol screening program designed to detect controlled substances/ alcohol as directed by the G.C.C.S.C.D. Probationer agrees to refrain from breaking any Texas drug law and realizes that failure to get a clean report from such drug/alcohol screening may alone be sufficient to revoke his probation;

18A. [Deleted by Court];

18B. [Deleted by Court];

19. (X) Abstain from the use of alcohol in any form at any time and do not enter any bar, tavern, lounge or other similar place;

20. [Deleted by Court];

21. Probation supervision shall be transferred to Harris County at Defendant's request;

22-29 [Deleted by Court];

30. (X) Within thirty (30) days make an appointment for a ALCOHOL ABUSE assessment evaluation and furnish proof to the probation officer of such appointment and then a written report with the

findings and recommended therapy shall also be furnished to the probation officer. The Defendant will maintain the treatment suggested until finally released and proof of release once again furnished to his probation officer in writing;

31. [Deleted by Court];

32. (X) Within thirty (30) days make an appointment for a PSYCHOLOGICAL assessment evaluation and furnish proof to the probation officer of such appointment and then a written report with the findings and recommended therapy shall also be furnished to the probation officer. The Defendant will maintain the treatment suggested until finally released and proof of release once again furnished to his probation officer in writing;

The Court may alter or revoke probation for violation of any condition of probation. No condition may be altered without written order by this Court except that the probation officer supervising this probationer is authorized, with the written consent of the probationer, to transfer this probation to different programs within the probation program in accordance with art. 42.12, sec. 10(d)(e), C.C.P. To qualify for probation the probationer waives extradition from another state or foreign nation if a motion to revoke probation is filed against him in this cause.

And, the Defendant in open Court, in person, informed the Court that he did not wish to appeal his conviction and waived the right to file a motion for new trial or to appeal the conviction.

And the foregoing terms and conditions of probation having been made known to the Defendant, in person, in

open Court, the Defendant voluntarily and agreed to the same and bound himself to comply with them.

And, the Defendant's thumbprint that appears on this judgment was taken in accordance with Article 38.33 of the Code of Criminal Procedure.

Whereupon, it was the further order of the Court that the Defendant be now released from custody upon probation as herein provided for.

SIGNED on this the 5th day of August A.D. 1993.

/s/ Illegible
JUDGE PRESIDING
212th JUDICIAL DISTRICT
COURT
GALVESTON COUNTY,
TEXAS

I acknowledge receipt of a copy of the above order of probation and fully understand same.

/s/ Jerry Horowitz
DEFENDANT

A copy furnished to the above named probationer and noted in the Docket this 5th day of August, A.D., 1993.

EVELYN ROBISON WELLS, DISTRICT CLERK GALVESTON COUNTY, TEXAS

/s/ Kay Reynolds, DEPUTY CLERK
CLERK, 212th JUDICIAL DISTRICT COURT GALVESTON COUNTY, TEXAS

[Certification of District Clerk]

[THUMBPRINT]
DEFENDANT'S RIGHT THUMBPRINT
[Omitted in Printing]

V.T.C.A. Penal Code

§ 22.011. Sexual Assault

(a) A person commits an offense if the person:

(1) intentionally or knowingly:

(A) causes the penetration of the anus or female sexual organ of another person by any means, without that person's consent;

(B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or

(C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or

(2) intentionally or knowingly:

(A) causes the penetration of the anus or female sexual organ of a child by any means;

(B) causes the penetration of the mouth of a child by the sexual organ of the actor;

(C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or

(D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor.

(b) A sexual assault under Subsection (a)(1) of this section is without the consent of the other person if:

(1) the actor compels the other person to submit or participate by the use of physical force or violence;

(2) the actor compels the other person to submit or participate by threatening to use force or violence against the other person, and the other person believes that the actor has the present ability to execute the threat;

(3) the other person has not consented and the actor knows the other person is unconscious or physically unable to resist;

(4) the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it;

(5) the other person has not consented and the actor knows the other person is unaware that the sexual assault is occurring;

(6) the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge; or

(7) the actor compels the other person to submit or participate by threatening to use force or violence against any person, and the other person believes that the actor has the ability to execute the threat.

* * *

(f) An offense under this section is a felony of the second degree.

* * *

Amended by Acts 1991. 72nd Leg., ch. 662, § 1, eff. Sept. 1, 1991.

BEFORE THE
BOARD OF DISCIPLINARY APPEALS
THE SUPREME COURT OF TEXAS

IN THE MATTER OF	)	
JEROME KAHN	)	DOCKET NO. 02377
HOROWITZ, STATE BAR	)	
CARD NO. 10011690	)	

****

DISCIPLINARY HEARING

****

BE IT REMEMBERED that the above-entitled matter came on for hearing on the 5th day of November, 1993, at Hilgers & Watkins, 98 San Jacinto Boulevard, Suite 1300, Austin, Texas, before CHAIRMAN TOM WATKINS, and the following proceedings were reported by Kim Bowen, Notary Public in and for Travis County, Texas:

* * *

[p. 7] notwithstanding the fact that he received a probated sentence, that the appropriate sanction in the case is disbarment. While the appeal is pending, that there would – and also that while the appeal is pending that an interlocutory order of suspension be entered suspending him from the practice of law.

CHAIRMAN WATKINS: Counsel?

OPENING STATEMENT BY THE RESPONDENT

MR. SAUER: Kurt Sauer, Botsford & Sauer for the respondent.

My argument is that in this type of case, the burden of proof is on the State Bar on all the issues, that sexual assault, as a matter of law, is not moral turpitude, that you need to look at the facts for this kind of case and see what happened in this specific case. Your rules prohibit us from introducing any evidence about that. And I've put my defenses in my response here, but just very briefly, I believe that this Board's rules violate constitutional due process because if [p. 8] the offense is not one that's per se – no matter what the facts are – moral turpitude, then the Board needs to look at the facts. And the Board rules don't let us do that, so I believe that violates constitutional due process.

If the Board finds that all the things it needs to find here, the proper penalty here, or result, would be a suspension under 8.06, because the sentence was fully probated. And I'm not sure of the procedure here. It's my understanding in most other disciplinary proceedings that the matters are privileged and confidential, and I'd object to, I guess, the complainant's mother being here during the meeting.

CHAIRMAN WATKINS: Under the current rules, compulsory hearings are – which are on the record are subject to open meetings, and we, therefore, are obligated to let anybody come listen to our proceedings that want to come listen to them while we're on the record.

MR. SAUER: Very good.

CHAIRMAN WATKINS: All [p. 9] right. Anything further from the opening statements?

Counsel, you may proceed with your evidence.

(At this time documents were marked as Exhibit Nos. 1, 2, and 3 for identification.)

MS. RODRIGUEZ: Yes, Your Honor. At this time I would like to introduce into evidence a copy of the indictment, jury verdict of guilty, and judgment in Cause No. 92CR0767 as Exhibits 1, 2, and 3 for petitioner.

CHAIRMAN WATKINS: Any objections?

MR. SAUER: I don't have any objection to the judgment, because I believe that's appropriate under your rules. I don't believe the indictment and the – well, I don't have any objections to 2 or 3, but I have an objection to Exhibit 1 under the rules that allow introduction of evidence only – well, the only facts that we can go to are the judgment. Let me grab a copy of these rules.

Here we go. Under your rules [p. 10] Roman Numeral II, the only evidence of facts that can come in are whether this is the same man who was convicted and whether the conviction is valid. So I object to the Exhibit 1, the indictment, because it doesn't meet those rules.

CHAIRMAN WATKINS: The objection will be overruled. They are admitted.

(At this time Exhibits Nos. 1, 2, and 3 were received into evidence.)

MS. RODRIGUEZ: I would also like to call Mr. Horowitz as a witness.

PRESENTATION BY THE STATE BAR

JEROME KAHN HOROWITZ

was called as a witness and, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MS. RODRIGUEZ:

Q. Please state your name.

A. Jerry Horowitz.

Q. Are you an attorney licensed to practice law in [p. 11] the State of Texas?

A. Yes, ma'am.

Q. Could you please state your State Bar number?

A. 11011690.

Q. Were you convicted on or about May 19th, 1993 of the offense of sexual assault?

A. Yes, I was.

Q. What was your sentence in that case?

A. Ten years' probation and restitution.

Q. Are you the subject of the judgment that has been marked and introduced into evidence as Petitioner's Exhibit No. 3?

A. Yes, I am.

MS. RODRIGUEZ: Pass the witness.

CHAIRMAN WATKINS: Any questions?

MR. SAUER: I have questions that I'd like to ask the witness, but I don't want to waive my rights to complain under these rules because of things that I'd have to go to would deal with the underlying facts. And, again, my – one of my complaints is that the rules for this Board are unconstitutional because they say I can't ask [p. 12] him that. So I don't want to ask him those questions and waive my rights. I think the – my suggestion, anyway, to make it easier would be pass the witness now, and I can make a bill that would take three or four minutes when we're finished.

CHAIRMAN WATKINS: It's up to you.

MR. SAUER: Yes, sir. That's what we'll do.

CHAIRMAN WATKINS: All right.

MS. RODRIGUEZ: I have no further questions.

CHAIRMAN WATKINS: No further questions. Any further evidence from State Bar?

MS. RODRIGUEZ: None at this time, Your Honor.

CHAIRMAN WATKINS: Counsel?

MR. SAUER: We don't have evidence to put on. We're going to, with your permission, do that in a bill when we're finished. And all I have is argument.

[p. 13] CHAIRMAN WATKINS: Okay.

All right. The evidence is closed, and I will recognize the counsel for the State Bar for her closing argument.

CLOSING STATEMENT BY THE STATE BAR

MS. RODRIGUEZ: Your Honor, it is our position that Mr. Horowitz has been convicted of an intentional crime, that the elements of knowledge or intent which are required under Disciplinary Rule 1.010, which requires knowledge or intent, were part of the – of the crime or the conviction that was presented, and that it is not necessary for us to present any additional proof as to those two elements, that those were established during the trial and that there is no question that the offense of sexual assault does require proof of knowledge or intent.

In regards to Mr. Sauer's argument that this is not a crime involving moral turpitude, there is no law or no case stating that it is not. And we would urge the Court at this time to find that sexual assault

* * *

[p. 15] I pass these out –

CHAIRMAN WATKINS: All right.

MR. SAUER: – if anybody cares for that. I didn't quite make enough. Sorry.

CLOSING STATEMENT BY THE RESPONDENT

MR. SAUER: Starting on this outline, I've set out in No. 1 my argument here. And it's clear under both federal law in the Medrano case, which is 956 F 2nd 101, and under state law that the burden of proof in this kind of case on every element is on the State Bar. It's my argument, which I'll get to in a moment, that sexual assault – that offense is not, per se – does not involve, per

se, moral turpitude. And what I mean by that is there are some instances when a person can be convicted of sexual assault, just like there are some instances when a person can be convicted of regular assault when it's not automatically involving moral turpitude.

I believe the U.S. Constitution [p. 16] and the State Bar rules require this Board to look at the facts in a case where the offense is not, per se, moral turpitude. This Board's rule –

CHAIRMAN WATKINS: Counsel, let me ask you –

MR. SAUER: Yes, sir,.

CHAIRMAN WATKINS: I have read your pleadings, and I understand that your position is that the elements of the crime have not been proven in the lower trial court and you're appealing on that basis. But assume for a moment that the elements of the crime have been proven and the conviction, as stated in the indictment, has been proven. Is there any way that that does not involve moral turpitude if the elements in the indictment has been proven?

MR. SAUER: Yes, sir. And it's just like in the Turton case, which is what I'm basing that argument on. That was a case where the San Antonio Court of Appeals considered this exact issue. And what that court decided was Mr. Turton, the lawyer, was convicted in an indictment of the elements of [p. 17] aggravated assault, which are worse, as you'd assume, than regular assault. And what the Court said there is, "We're not going to say that even aggravated assault is automatically moral turpitude

and that we've got to look and see what really happened in that case." And I think that's what we've got to do here.

And in the Turton case – and I brought three copies of it for anybody who's interested. In the Turton case, the Court went down and talked about what kind of offenses involve moral turpitude, per se. And it listed some obvious ones, I think, that a lot of people would agree on, murder, things like that. But that Court said, as a matter of law, you can't just automatically say that because somebody's convicted of aggravated assault, that that involved moral turpitude. And that's what I'm saying here. Just because Mr. Horowitz has been convicted in a trial court of sexual assault, not aggravated sexual assault, but sexual assault, that you can automatically say that involves moral turpitude.

And in your rules and also in [p. 18] the case law, what you focus on here in the offense itself, the elements of sexual assault or the elements of aggravated assault.

So to answer your question Mr. Watkins, yes, sir, I do believe that even though he was convicted in a trial court and is on appeal that under Turton and the other reasons I've set out in my outline, that we can find that it wasn't, per se, moral turpitude.

CHAIRMAN WATKINS: All right. So your answer is that even if all the elements of the indictment are taken as true before this Board, that does not constitute, per se, moral turpitude. And your reliance is on the Turton case for that?

MR. SAUER: That's my under – that's my bottom reliance, yes, sir, but there are quite a few other cases which support that. And I think also the State Bar rules, some of the comments to the rules support that.

And back to the outline, it's my position that because this is not one of the crimes that is just, per se, bad, that you've got to look at the facts that these boards'

* * *

[p. 25] the facts in this particular case. We have tried to hold this to a statutory definition. Statute either includes moral turpitude or not. You, in effect, are arguing that if we're going to do that, which we seem to have chosen to do, then if there is any interpretation of facts under the statute which does not involve moral turpitude, then we cannot suspend under the way we've chosen to go about it.

MR. SAUER: Exactly. And that's what I've tried to say in my unartful way on No. 1, is that the Board's rules prevent any lawyer from putting on what that – that may be the case here. Let's – that may be what happened to Mr. Horowitz. You don't know. If that is what happened to him, then that's not moral turpitude. And maybe that is or maybe it's not. But if you're going to throw him out, he's got to have constitutional due process to tell you what really happened.

CHAIRMAN WATKINS: Unless, of course, we find that under any interpretation of the facts under this statute it involves moral turpitude –

MR. SAUER: Exactly.

[p. 26] CHAIRMAN WATKINS: – then there's no constitutional implication.

MR. SAUER: That's my opinion.

CHAIRMAN WATKINS: If we feel that there is any set of facts which would constitute a violation of this act, of this statute, which does not involve moral turpitude and we prevent you from going into the facts of the case by our rules, then you claim a constitutional violation.

MR. SAUER: Yes, sir.

CHAIRMAN WATKINS: Okay.

MR. SAUER: So if we wanted to, and I don't – if you want to do this, I'll be happy to, but I think I could stand here and come up with a lot of different fact scenarios where you can be convicted, but it doesn't equal moral turpitude the ways those words are used in the State Bar rules.

In the No. 2 hypo, that's the worst one. If you've got two lawyers and neither one can give consent because they're botn at a Christmas party later on, then – so the next day they both get disbarred. And

* * *

[p. 41] when I go shoot somebody that I've got a problem.

Thinking about whether this is the kind of thing that affects fitness to practice law, the law is a very important thing and you need to watch out who the lawyers are because they can cause a lot of harm real fast. So are airline pilots, though. Now, I don't think I'm going to have a problem getting on Southwest Airlines and flying

to Dallas if I know my pilot might have done whatever happened here. That doesn't affect his fitness to fly an airplane. And even if it's a dentist, like my brother, I mean, that doesn't affect his fitness to practice dentistry. And this doesn't affect Mr. Horowitz's fitness to practice law.

And I'm going to move on down to about my last topic unless somebody has another question about, per se, moral turpitude.

CHAIRMAN WATKINS: Proceed.

MR. SAUER: Thank you. The parts of the rule that I complain about are in Part 2, which limits the evidence to contesting the issue of identity and the validity of the [p. 42] conviction. And I disagree with limiting a legal argument to whether the offense is an intentional crime. Now, that's what we've been talking about is sexual assault, per se, moral turpitude. That's the only way in the world this thing can be an intentional crime. It doesn't come under any of the other things in there.

That's all I can talk about. Under your rules, I probably can't even sit here and say these are unconstitutional. And that's the problem I have with these rules, is it's just hacking off large chunks of somebody's due process rights.

CHAIRMAN WATKINS: Well, now, counsel, does this affect due process rights if, in fact, we buy your argument that the minimum possible conduct to get convicted under this statute; if we hold that that involves

moral turpitude, have we not protected your client's constitutional and due process rights? We're not going to judge him by what happened in this case. We're going to give him the lightest possible interpretation of what could be a conviction under this case; in other

* * *

[p. 48] CHAIRMAN WATKINS: It's admitted and marked as Exhibit what?

MS. RODRIGUEZ: No. 4.

(At this time a document was marked as Exhibit No. 4 for identification and was received into evidence.)

CHAIRMAN WATKINS: Does that close the evidence?

MS. RODRIGUEZ: That closes the evidence.

CHAIRMAN WATKINS: Counsel, let me ask you, I read the Turton case and I read the elements of aggravated assault, and I'm pretty offended by those elements. And, yet, that court says we – that they were going to look at the underlying facts to determine and they were not willing to hold that the aggravated assault statute was, per se, a moral turpitude.

Do you see any way that we can distinguish between this statute and the aggravated assault statute as to whether or not it's a, per se, moral turpitude crime?

MS. RODRIGUEZ: Well, I think that we have to make that distinction [p. 49] given the nature of the offense. As far as the evidence, the rules that are in effect that govern this Board do not permit any additional evidence other than what's been presented. However, the

fact that those rules are in effect should not in any way prohibit or prevent this Board from finding that the offense of sexual assault is an offense involving moral turpitude, particularly under the definition of moral turpitude as set out in the Munoz case and cited again in the Turton case.

CHAIRMAN WATKINS: Well, I mean, I – I don't think this Board is hesitant to go down a different path from the San Antonio Court of Civil Appeals if it feels it should. But I'm looking for any help you can give me as to why the reasoning in the majority of the Turton case does not comport with Mr. Sauer's argument as to whether or not it's per se. They took the position that some of those really awful things you have to do to get convicted of aggravated assault may not be, per se, involving moral turpitude.

MS. RODRIGUEZ: I would [p. 50] argue that the Turton case – one of the problems in that case was that there was not additional evidence in the record to guide the court in making – in finding that aggravated assault was an offense involving moral turpitude.

CHAIRMAN WATKINS: And, we, of course, put the respondent and both you in that same posture by our rules. I mean, we have framed it because of our internal rule to put us exactly in the situation which the Turton case was aimed at, is the way I'm reading it right now. I'm asking for any help that the State Bar might want to give me on that.

MS. RODRIGUEZ: Well, again, I can just restate my position that I do not believe that the rules that are in effect for the purposes of governing the Board and for the

purposes of efficient functioning of the Board should in any way preclude or prohibit the Board from finding that this offense is an offense involving moral turpitude.

CHAIRMAN WATKINS: All right. That concludes our record.

BEFORE THE
BOARD OF DISCIPLINARY APPEALS
THE SUPREME COURT OF TEXAS

IN THE MATTER OF	)	
JEROME KAHN	)	DOCKET NO. 02377
HOROWITZ, STATE BAR	)	
CARD NO. 10011690	)	

****

BILL OF EXCEPTION

****

* * *

[p. 5] JEROME KAHN HOROWITZ

was called as a witness and, having been previously duly sworn, testified as follows:

EXAMINATION

QUESTIONS BY MR. SAUER:

Q. My name is Kurt Sauer, with Botsford & Sauer, attorney for the respondent in Docket 02377 before the Board of Disciplinary Appeals of the Supreme Court of Texas. We're making a bill because the Board's rules don't permit us to put on evidence of any facts about the underlying situation that was involved in the criminal conviction at issue here.

Will you state your name?

A. I'm Jerry Horowitz.

Q. Were you present at the underlying criminal trial that's the subject of the hearing before the Board of Disciplinary Appeals today?

A. Yes, I was.

Q. Were you present when the complainant in that cause testified?

A. Yes, I was.

Q. What was her name?

A. Anisa Meinardus.

[p. 6] Q. Was Ms. Meinardus over 21 years of age?

A. Yes.

Q. What was her testimony at the time of trial regarding what she recalled about the evening in question?

A. She testified that she had no recollection as to the sexual contact between herself and myself.

Q. Did she have any recollection about whether she did or did not give consent to any type of sexual activity?

A. She had no recollection as to what transpired that night. Her only testimony in reference to consent was that she said she would not have given consent to anyone at the party.

Q. But she didn't remember whether she did or did not that night, correct?

A. That's correct.

(At this time there was a brief discussion off the record.)

QUESTIONS BY MR. SAUER:

Q. Did a – did several people testify before the Grand Jury in this case?

A. I think approximately 80 or 90 people.

Q. Do you recall any of the testimony of the [p. 7] witnesses before the Grand Jury?

A. Yes. Mr. Walter Einkauf testified he was a witness to my sexual contact with Meinardus, and his testimony was that she was moaning pleasurably, which obviously indicated she was conscious and that she was consenting.

Q. Had either you or Ms. Meinardus had any alcohol on the evening in question?

A. Yes, we had.

Q. Tell us what kind and how much and who initiated that.

A. Ms. Meinardus initially started drinking beer, and I was drinking vodka and grapefruit juice. And she initiated drinking tequila slammers, and but for one coffee cup full, she and I, one on one, drink for drink, consumed a quart of tequila.

Q. Did any medical experts testify at the trial?

A. Yes, one for the State and one for the defense.

Q. Do you recall their testimony?

A. Yes. They corroborated each others' testimony in reference to alocholic blackout. The testimony from both experts was that it is not uncommon not to remember

during alcohol blackout, but it is not a state of being [p. 8] unconscious, and a person does have the ability to consent, to fight, be active.

Q. Did – on the evening in question, did Ms. Meinardus ever fight or do anything that would lead you to believe she didn't consent?

A. To the contrary. Ms. Meinardus helped me take her clothes off. Prior to that, Ms. Meinardus and I went into a room other than the room we had been in where there was no one but the two of us.

(At this time a document was marked as Bill Exhibit No. 1 for identification, and there was a brief discussion off the record.)

QUESTIONS BY MR. SAUER:

Q. Can you identify what we've marked as Bill Exhibit 1?

A. Yes.

Q. What is that?

A. This is an affidavit from Mr. Ed Reed, who was the trial court reporter.

Q. And did – go ahead.

A. Mr. Reed is preparing the transcript of the trial, and his affidavit states that it couldn't possibly have been ready by today's [p. 9] date for this hearing.

Q. Did you ask him to prepare parts of that transcript for the hearing?

A. Yes.

Q. He said it couldn't be ready, right?

A. Right. As a matter of fact, as stated in his affidavit, Mr. Reed has requested an extension of time to the Court of Appeals until January 7.

MR. SAUER: We'll offer Bill Exhibit 1.

We don't have any more questions.

MS. RODRIGUEZ: I just have a couple of questions.

FURTHER EXAMINATION

QUESTIONS BY MS. RODRIGUEZ:

Q. Mr. Horowitz, the testimony that you have presented today regarding the events the evening of the assault, was that presented at the time of your trial, your criminal trial?

A. Yes.

Q. And what was the outcome of that criminal trial?

[p. 10] A. I was found guilty by a jury.

MS. RODRIGUEZ: No further questions.

CHAIRMAN WATKINS: Do you offer the bill?

MR. SAUER: Yes.

CHAIRMAN WATKINS: The bill is overruled.

MR. SAUER: Okay.

CHAIRMAN WATKINS: Secondly, let the record show that Mary Alice McLarty has recused herself

from any deliberations on this case. And that concludes the record.

(Bill of Exception concluded.)

BEFORE THE BOARD OF DISCIPLINARY APPEALS
OF
THE SUPREME COURT OF TEXAS

IN THE MATTER OF	§	
JEROME KAHN	§	DOCKET NO. 02377
HOROWITZ STATE BAR	§	
CARD NO. 10011690	§	

RESPONSE TO PETITION FOR COMPULSORY DISCIPLINE

TO THE HONORABLE BOARD OF DISCIPLINARY APPEALS:

JEROME KAHN HOROWITZ, Respondent, makes the following response to the Petition for Compulsory Discipline filed by the Chief Disciplinary Counsel of the State Bar of Texas:

1. The affidavit of Ms. Dawn Miller, attached as Exhibit C to the Petition, is insufficient to show that Respondent is the same person as the person convicted in the proceeding described in paragraph 3 of the Petition and described further in the Judgment attached as Exhibit A to the Petition. The affidavit is made upon Ms. Miller's "information and belief." Respondent submits that an Affidavit made on "information and belief," rather than on personal knowledge, is insufficient to meet the requirements of Rule 8.04, Texas Rules of Disciplinary Procedure.

2. The Judgment attached as Exhibit "A" to the Petition is not "final." Respondent has filed a Motion for New Trial which is set for hearing on October 21, 1993.

Rules 8.04, 8.05 and 8.06 are applicable only to "final" judgments.

3. The offense of sexual assault is not, *per se*, an "Intentional Crime" as defined by Rule 1.06(O). The offense does not involve the misapplication of money or other property held as a fiduciary; it is not a "Serious Crime" as defined in Rule 1.06(U). Further, the underlying facts of the criminal case do not constitute an "Intentional Crime."

4. The compulsory discipline rules forwarded to Respondent with the Petition and attached hereto as Exhibit "A" are unconstitutional and also violate the Texas Rules of Disciplinary Procedure and state case law. Rule 8.04 states that "the Board of Disciplinary Appeals shall immediately determine whether the attorney has been convicted of an Intentional Crime. . . . " Rule 8.04 further states that "Nothing in these rules prohibits proof of the necessary elements in such Disciplinary Action by competent evidence in any other manner permitted by law." The rules attached hereto as Exhibit "A" limit the fact issues which may be considered at the hearing to the "issue of identity" and "challenging the validity of the conviction"; the legal issues are limited to "whether the offense for which the Respondent has been convicted is an Intentional Crime. . . . " Respondent submits that the offense for which he was convicted is not, *per se*, an Intentional Crime, and that the Board must consider the facts underlying the conviction as described in *Turton v. State Bar of Texas*, 775 S.W.2d 712 (Tex.App. – San Antonio 1989, writ denied). The rules attached as Exhibit "A" limit the fact and legal questions in a manner which will not permit such an inquiry.

5. Part III of the Texas Rules of Disciplinary Procedure (Compulsory Discipline) and Rules 1.06(o) and 1.06(u) are unconstitutionally vague because they do not describe the culpable mental state required for an attorney to be automatically disbarred or suspended.

6. The Petition seeks disbarment of Respondent. Respondent's sentence, prior to the Motion for New Trial, was fully probated. Pursuant to Rule 8.06, if this Board determines that the offense for which Respondent was convicted is an "Intentional Crime," and that the conviction is "final," the Board should proceed under Rule 8.06, Suspension, rather than Rule 8.05, Disbarment.

WHEREFORE, Jerome Kahn Horowitz, Respondent, respectfully requests the Board of Disciplinary Appeals to dismiss this Petition with prejudice for the reason that (a) Respondent's conviction is not "final," (b) the offense for which Respondent was convicted is not an "Intentional Crime," and (c) the rules attached to the Petition as Exhibit "A" are unconstitutional and also violate the Texas Rules of Disciplinary Procedure and state law. If this Board determines that Respondent is subject to compulsory discipline pursuant to Rule 8.04, Respondent requests the Board not to disbar him, but rather to suspend him pursuant to Rule 8.06. Last, Respondent

requests the Board to grant him such other relief to which he may show himself justly entitled.

Respectfully submitted:

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BY: /s/ K Sauer
Kurt M. Sauer
State Bar No. 17673700
David L. Botsford
State Bar No. 02687950

Attorneys for Respondent
Jerome Kahn Horowitz

CERTIFICATE OF SERVICE

My signature below certifies that a true copy of the Response to Petition for Compulsory Discipline has been forwarded on September 13, 1993 to:

Ms. Dawn Miller Cert. Mail No. P422812480
Mr. James McCormack
OFFICE OF THE GENERAL COUNSEL
State Bar of Texas
P. O. Box 12487
Austin, TX 78711

/s/ K Sauer
Kurt M. Sauer

EXHIBIT A

COMPULSORY DISCIPLINE

I. Initiation of Proceeding:

Pursuant to Texas Rule of Disciplinary Procedure 8.03, the State Bar of Texas shall file a petition with the Board of Disciplinary Appeals and serve the Respondent Attorney in accordance with the Texas Rules of Civil Procedure, and such notice shall include the date and place of hearing which shall not be fewer than 20 days from the service of petition. Within twenty (20) days of service of the petition, the Respondent shall file an answer setting forth:

(a) any factual dispute as to whether the Respondent is the same person as the party adjudicated guilty or who received probation with or without an adjudication of guilt;

(b) any factual dispute as to the validity of the conviction;

(c) any legal argument that the offense for which the Respondent has been convicted is not an Intentional Crime as defined in Texas Rules of Disciplinary Procedure 1.06(O).

II. Hearing

The hearing shall be limited to the introduction of evidence contesting the issue of identity or challenging the validity of the conviction. Legal argument shall be limited to whether the offense for which the Respondent

has been convicted is an Intentional Crime as defined in Texas Rules of Disciplinary Procedure 1.06(O).

D4477

IN THE SUPREME COURT OF TEXAS

D-4477

JEROME KAHN HOROWITZ, APPELLANT

v.

STATE BAR OF TEXAS, APPELLEE

ON APPEAL FROM THE BOARD OF DISCIPLINARY APPEALS

(Filed Jan. 6, 1994)

BRIEF OF APPELLANT AND REQUEST FOR ORAL ARGUMENT

Respectfully submitted:

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POINT TWO RESTATED

THE BOARD OF DISCIPLINARY APPEALS ERRED IN ITS DETERMINATION THAT APPELLANT IS SUBJECT TO PART VIII (COMPULSORY DISCIPLINE) OF THE TEXAS RULES OF DISCIPLINARY PROCEDURE BECAUSE THE OFFENSE OF SEXUAL ASSAULT IS NOT *PER SE* AN INTENTIONAL CRIME, AND PART VIII IS CONSTITUTIONAL ONLY IF IT IS LIMITED TO OFFENSES WHICH *PER SE* CONSTITUTE AN INTENTIONAL CRIME.

ARGUMENTS AND AUTHORITIES UNDER POINT TWO

38. The issue in this case is whether sexual assault is an intentional crime which would bring this case under Part VIII of the Rules. If sexual assault is not *always* such a crime, the State Bar cannot enforce the compulsory discipline provisions of Part VIII. Rule 8.01 states that Part VIII is not exclusive; an attorney may also be disciplined as a result of the underlying facts of the conviction. A disciplinary proceeding must consider the underlying facts of the conviction, if the conviction is not for an intentional crime. Appellant's disciplinary proceeding should be governed by the ordinary disciplinary procedure of Parts II, III and IV. If sexual assault is not *per se* an intentional crime, the Board erred in applying the Compulsory Discipline Rules to Appellant's disciplinary proceeding for the reasons set out below.

POINTS THREE, FOUR AND FIVE RESTATED

THE APPLICATION OF THE "RULES OF PROCEDURE FOR COMPULSORY DISCIPLINE MATTERS BEFORE THE BOARD OF DISCIPLINARY APPEALS" TO THE DISCIPLINARY PROCEEDING BROUGHT AGAINST APPELLANT VIOLATES APPELLANT'S RIGHTS UNDER THE DUE PROCESS PROVISIONS OF THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE THE OFFENSE OF SEXUAL ASSAULT IS NOT *PER SE* AN INTENTIONAL CRIME.

THE APPLICATION OF THE "RULES OF PROCEDURE FOR COMPULSORY DISCIPLINE MATTERS BEFORE THE BOARD OF DISCIPLINARY APPEALS" TO THE DISCIPLINARY PROCEEDING BROUGHT AGAINST APPELLANT VIOLATES APPELLANT'S RIGHTS UNDER THE DUE PROCESS PROVISIONS OF ART. 1, §§ 13 AND 19 OF THE TEXAS CONSTITUTION BECAUSE THE OFFENSE OF SEXUAL ASSAULT IS NOT *PER SE* AN INTENTIONAL CRIME.

THE APPLICATION OF THE "RULES OF PROCEDURE FOR COMPULSORY DISCIPLINE MATTERS BEFORE THE BOARD OF DISCIPLINARY APPEALS" TO THE DISCIPLINARY PROCEEDING BROUGHT AGAINST APPELLANT VIOLATES APPELLANT'S RIGHTS UNDER THE OPEN COURTS PROVISIONS OF ART. 1, § 13 OF THE TEXAS CONSTITUTION BECAUSE THE OFFENSE OF SEXUAL ASSAULT IS NOT *PER SE* AN INTENTIONAL CRIME.

ARGUMENTS AND AUTHORITIES UNDER POINTS THREE, FOUR AND FIVE

39. Acting on the petition without allowing Appellant the opportunity to present evidence regarding the underlying conduct violated Appellant's due process rights. Procedural due process and fundamental fairness dictate that a party must be given a reasonable opportunity to be heard on the merits of his case; such an opportunity must be granted at a meaningful time and in a meaningful manner. *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983). The provisions of the 14th Amendment apply to the exercise of state power through an administrative tribunal having jurisdiction over the rights or privileges of a licensed occupation. *Madden v. Tex. Bd. of Chiropractic Examiners*, 663 S.W.2d 622, 625 (Tex. App. – Austin 1983, writ ref'd. n.r.e.). Procedural due process requires a hearing that is "*relative* to the issues of fact and law which will *control the result* to be reached by the administrative tribunal," (emphasis in original) *Id.* at 626, citing *Morgan v. United States*, 58 S.Ct. 773, 776-77 (1938) ("Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be *fairly advised of what* the Government proposes and to be heard *upon its proposals before it issues its final command.*" (emphasis added in *Madden*))

40. Procedural due process rights apply to disciplinary cases. *In re Ruffalo*, 390 U.S. 544, 550 (1968). The threat of disbarment is a powerful form of compulsion. *Spevack v. Klien*, 87 S.Ct. 625, 628 (1967). Notice is required to satisfy due process requirements. *Zauderer v. Office of*

Disciplinary Counsel of the Supreme Court of Ohio, 105 S.Ct. 2265 (1985)

41. Unless the offense of sexual assault is *per se* a felony involving moral turpitude, i.e., unless every conviction for sexual assault must necessarily involve conduct which constitutes moral turpitude, Appellant's due process rights under the United States and Texas Constitutions and their amendments have been violated because the Compulsory Discipline Rules prohibit him from offering any evidence about the underlying conduct.

42. Also, the Rules do not state which felonies involve moral turpitude. There is a lack of case law regarding which felonies involve moral turpitude. Rule 8.04 states that, upon introduction of evidence of a conviction, the Board shall immediately determine whether an attorney has been convicted of an intentional crime. This instruction is proper if it means that the Board will determine if the conviction is one which has *previously* been held to be an intentional crime. However, this instruction violates due process if it means that the Board will make a conclusion of law as to whether the conviction constitutes an intentional crime. This would amount to increasing the severity of a crime after the act has been committed. To the extent that the disciplinary proceeding is punitive, it is unfair to determine that an attorney is subject to the more onerous process of compulsory discipline after the attorney has committed the act.

43. This is a case where the Board has made a conclusion of law that a crime is an intentional crime subsequent to commission of the act by Appellant. No

Texas case law has held that sexual assault is an intentional crime. The Board's action subjected Appellant to the more onerous procedure of compulsory discipline after Appellant's commission of the prohibited act.

44. Rule 8.04 should be read to instruct the Board to determine whether the attorney has committed an intentional crime by comparing the attorney's offense to a checklist of crimes previously held to be intentional crimes. The initial determination that a particular crime is an intentional crime should be decided in an ordinary disbarment proceeding where both sides put on evidence. This will give the initial actor the due process right of arguing against classification as an intentional crime. Subsequent actors will have the due process right of notice that the crime is an intentional crime.

45. The case law analyzing the due process or due course of law provisions of Art. I, §§ 1[illegible] and 19 of the Texas Constitution is sparse. The few courts citing these sections appear to believe that the scope of the due process rights under these sections is at least as expansive as the 5th and 14th Amendements [sic] of the United States Constitution. *San Saba County Water Control and Improvement Dist. No. I, et al. v. Sutton, et al.*, 12 S.W.2d 124 (Tex.Com.App. 1919). Although the open courts provision typically applies to a remedy or cause of action, the complete lack of opportunity to present evidence may constitute a violation of the open courts provision.

FILE COPY

IN THE SUPREME COURT OF TEXAS

D-4477

JEROME KAHN HOROWITZ, APPELLANT

v.

STATE BAR OF TEXAS, APPELLEE

ON APPEAL FROM THE BOARD
OF DISCIPLINARY APPEALS

MOTION FOR REHEARING

(Filed Jan. 27, 1994)

TO THE HONORABLE SUPREME COURT OF TEXAS:

Jerome Kahn Horowitz, Appellant, makes this motion for rehearing and shows:

> . . . If these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

Morgan v. United States, 304 U.S. 1, 22, 58 S.Ct. 773, 778 (1938).

1. On January 12, 1994, this Court affirmed the decision of the Board of Disciplinary Appeals ("BODA").

2. This Court erred in affirming BODA's decision because:

a. BODA's application of the "Rules of Procedure for Compulsory Discipline Matters Before the Board of Disciplinary Appeals" to Appellant's disciplinary proceeding violates Appellant's rights under the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution and the due process provisions of Art. I, § 19 of the Texas Constitution;

b. BODA erred in its conclusion of law that Appellant had been convicted of an "intentional crime" as defined by Rule 1.06(O), Texas Rules of Disciplinary Procedure[1];

c. BODA erred in its application of part VIII of the Rules to Appellant because the offense of sexual assault is not *per se* an intentional crime and part VIII is constitutional only if it is limited to offenses which *per se* constitute an intentional crime; and

d. BODA's application of the "Rules of Procedure for Compulsory Discipline Matters Before the Board of Disciplinary Appeals" to Appellant's disciplinary proceedings violates Appellant's rights under Rule 8.04.

3. Part VIII of the Rules applies to compulsory discipline cases. BODA has promulgated and applies the "Rules of Procedure for Compulsory Discipline Matters

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[1] All references to a "Rule" are to the Texas Rules of Disciplinary Procedure, unless otherwise noted.

before the Board of Disciplinary Appeals" ("Compulsory Discipline Rules") to its hearings brought pursuant to Part VIII. These rules limit any consideration of the underlying conduct and circumstances for which Appellant was convicted.

4. The application of the Compulsory Discipline Rules to compulsory discipline hearings made pursuant to Part VIII of the Rules violates Appellant's due process rights under the United States and Texas Constitutions, unless the offense for which Appellant was convicted is per se an intentional crime as defined by Rule 1.06(O). If a person can be convicted of an offense based upon underlying conduct and circumstances which do not meet the definition of an intentional crime, the application of the Compulsory Disciplinary Rules and Part VIII of the Rules is unconstitutional.

DUE PROCESS

5. The right or privilege to engage in a profession or occupation, once it is lawfully acquired, is a right or privilege protected by the due process clause of the United States and Texas Constitutions. *Francisco v. Board of Dental Examiners*, 149 S.W.2d 619 (Tex.Civ.App. – Austin 1941, writ ref'd). *Industrial Accident Board v. O'Dowd*, 303 S.W.2d 763 (Tex. 1957).

6. A citizen's due process rights apply whether the tribunal exercising jurisdiction over his rights or privileges is a judicial, legislative, executive or administrative one. "The requirements of due process of law extend to every case of the exercise of governmental power." *Francisco*, at 622.

> The provisions of the Fourteenth Amendment apply to the exercise of state power through an administrative tribunal having jurisdiction over the rights or privileges of a licensed occupation.

Madden v. Texas Board of Chiropractic Examiners, 663 S.W.2d 622, 625 (Tex.App. – Austin 1983, writ ref'd n.r.e.) (chiropractic license).

7. A "fundamental requirement of due process is the opportunity to be heard." *Searcy v. State Bar of Texas*, 604 S.W.2d 256, 260 (Tex.Civ.App. – San Antonio 1980, writ ref'd n.r.e.) (attorney disciplinary proceeding); *MJR Financing, Inc. v. Marshall*, 840 S.W.2d 5 (Tex.App. – Dallas 1992, no writ) (discovery death penalty sanctions).

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard. . . . " It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."

Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994 (1972) (*ex parte* seizure of property); *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965); *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983) (personal judgment rendered against Independent Administrator of estate). The purpose of due process is to minimize substantively unfair or mistaken deprivations of property, rights or privileges. *Fuentes*, at U.S. 81, S.Ct. 1994.

> For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair

> and simply mistaken deprivations of property interests can be prevented.

Fuentes, at U.S. 81, S.Ct. 1994.

8. The right to a hearing includes the right to present evidence. *Gonzales v. United States*, 348 U.S. 407, 75 S.Ct. 409 (1955); *Morgan v. United States*, 304 U.S. 1, 58 S.Ct. 773 (1938).

> The right to be heard assures a full hearing . . . , the right to introduce evidence at a meaningful time and in a meaningful manner. . . . In cases involving *factual disputes*, we hold that due process requires that a party be allowed to present evidence before a trial court can dismiss a case or enter a default judgment as a sanction for discovery abuse.

MJR Financing, at 10 (italics added) (death penalty discovery sanctions).

> The right to be heard includes the opportunity to introduce evidence, to cross examine witnesses, to be heard on questions of law and to have judgment rendered only after trial.

Nichols v. Martin, 776 S.W.2d 621, 623 (Tex.App. – Tyler 1989, no writ); *Cuellar v. Texas Employment Commission and Larco Leasing, Inc.*, 825 F.2d 930 (1987) (inability to cross examine affidavit testimony).

> . . . due process requires that one charged with contempt be accorded the opportunity not only to establish a complete defense, but to offer evidence and argument in extenuation of his offense and in mitigation of the penalty.

Ex Parte Ratliff, 3 S.W.2d 406, 408 (Tex. 1928) (contempt); *Ackerman v. United States*, 178 F.2d 983 (1949) (denaturalization proceeding); *Ex Parte Gordon*, 584 S.W.2d 686 (Tex. 1979) (constructive contempt).

9. Due process of law applies to the *method of making a judicial decision* as well as the protection of procedural and substantive rights.

Kramer Trading Corp. of Texas v. Lyons, 740 S.W.2d 522, 524 (Tex.App. – Houston [1st Dist.] 1987, no writ) (italics added).

10. Judicial curtailment of a constitutional right or freedom cannot be justified in the name of efficiency or by the erroneous notation that the resultant benefit will be judicial economy.

Kramer Trading Corp. of Texas, at 524.

> A prior hearing always imposes some costs in time, effort and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. . . . Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.
>
> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in

> particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praise-worthy government officials no less, and perhaps more, than mediocre ones. *Stanley v. Illinois*, 405 U.S. 645, 656, 92 S.Ct. 1208, 1215, 31 L.Ed.2d 551.

Fuentes, at U.S. 90, S.Ct. 1999, ftn. 22.

11. The Compulsory Discipline Rules and the application of Part VIII of the Rules can only be justified by a judicial economy argument, the argument that the conviction itself affects the attorney's moral fitness to continue in the practice of law, or the argument that a convicted attorney's due process rights are satisfied by the criminal trial. Judicial economy is not an acceptable justification. A conviction, standing alone, does not bear on an attorney's moral fitness to practice law. It is the underlying conduct, not the conviction, which shines the light on the dark areas of an attorney's soul; it is the *conduct* from which BODA or a court must extrapolate to reach the conclusion that an attorney does not have the moral fitness to continue in the practice of law. If the Compulsory Discipline Rules and Part VIII of the Rules satisfy due process in any situation (which Appellant denies), they do so only when the conviction *always* mirrors such conduct.

12. The fact that an attorney participates in the criminal trial does not save the Compulsory Disciplinary Rules and Part VIII from violating due process requirements. An attorney should not be forced to choose between a) waiving his Fifth Amendment rights, testifying to facts which will convict him of a lesser crime which

does not involve moral turpitude, and retaining his bar card, or b) risking the loss of his bar card.

MENS REA ELEMENT OF OFFENSE

13. This appeal concerns the issue of whether the offense of sexual assault is *per se* an intentional crime as defined by Rule 1.06(O). Appellant's argument focuses on the *mens rea* applicable to each element of the offense. In its brief, the State Bar has raised the issue of "rape." Although rape is an extremely important issue today, it is not an issue in this appeal. Our state legislature has defined the offense of sexual assault to include conduct whereby a man or woman can be convicted of the offense even if he or she has an honest belief that consent is present. The legislature has decided that the harm done by a man or woman engaging in sexual conduct with another under a mistaken but honest belief that he or she has consent is sufficient to merit a criminal conviction. Appellant respectfully requests an opportunity to address the Court on the issue of how the required *mens rea* of an offense affects the definition of intentional crime and the concept of moral turpitude.